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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 79.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE BROOKLYN CITY RAILROAD COMPANY,

Plaintiff in Error.

vs.

THE STATE BOARD OF TAX COMMISSIONERS.

Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

CHARLES A. COLLIN,
WILLIAM F. SHEEHAN,
Of Counsel for Plaintiff in Error.

Washington, April 10, 1905.

(19,000.)

Supreme Court of the United States,

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Error to the Supreme Court of the State of New York.

Brief on Behalf of Plaintiff in Error.

This proceeding comes to this Court by writ of error to review the final order and judgment of the Court of Appeals of the State of New York, which, by remittitur, was made the final order and judgment of the Supreme Court of that State (Record, p. 677).

The proceeding was originally instituted by writ of certiorari issued out of the Supreme Court of the State of New York, July 17, 1900, in pursuance of §45 of the Tax Law of that State, directed to the State Board of

Tax Commissioners of that State, for the purpose of reviewing the State Board's assessment for the year 1900 of the "special franchises" of the relator, The Brooklyn City Railroad Company (p. 11). The issues raised by the return of the State Board to the writ of certiorari were referred by the Supreme Court to Hon. Robert Earl to hear and determine (pp. 32-33), who rendered a decision July 15, 1902, modifying the assessment made by the State Board of Tax Commissioners and affirming the assessment as so modified (pp. 535-70), and a final order of the Supreme Court was entered accordingly, July 15, 1902 (p. 588). An appeal was taken from such final order of the Supreme Court to the Appellate Division of the Supreme Court, which, on January 6, 1903, reversed the order rendered on the decision of the referee (p. 625). An appeal from the final order of the Appellate Division was taken to the Court of Appeals, which, by an order made May 22, 1903, reversed the order of the Appellate Division and affirmed the order entered upon the decision of the referee (pp. 674-5). The remittitur from the Court of Appeals having been filed with the Supreme Court, the judgment of the Court of Appeals was made, the judgment of the Supreme Court, June 22, 1903 (pp. 675-6); and the writ of error from this Court to review the judgment of the Court of Appeals, thus made the judgment of the Supreme Court, was issued June 26, 1903 (pp. 677-9).

The questions under the Constitution of the United States, here sought to be determined, were expressly raised by the original petition for the writ of certiorari, and were necessarily determined by the Referee, and by the Supreme Court, on the entry of the original order, and by each of the Appellate Courts, on the decision of each of the appeals in the State Courts.

The errors asserted and here intended to be urged are that the statute of the State of New York, Chapter 712 of the Laws of 1899, by virtue of which the assessment of the "special franchises" of the relator was made, is unconstitutional in so far as it purports to authorize the

assessment and taxation of the intangible right or property included in the "special franchises" of the relator,

(1) as impairing the obligation of the contracts of the relator with the City and the State;

(2) as depriving the relator of its property without due process of law; and

(3) as denying to the relator equal protection of the laws (pp. 679-80).

The opinions in the courts below were as follows:

By the referee, at pp. 590-623 (on questions arising under the Federal Constitution at pp. 603-12).

At the Appellate Division, prevailing opinions per Parker, P. J., at p. 626; per Kellogg, J., at p. 634, and dissenting opinions per Smith, J., at p. 638, and per Chester, J., at p. 644.

By the Court of Appeals per Vann, J., at pp. 651-674, discussing questions arising under the Federal Constitution at pp. 672-3.

The statute of the State of New York in question (L. 1899, Ch. 712), amended Subdivision 3 of §2, §42 and §46 of the Tax Law of that State to read respectively as follows:

> "3. The terms 'land,' 'real estate,' and 'real property,' as used in this Chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electric conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public

places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property substance or product capable of transportion or conveyance therein or that is protected thereby including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets highways, or public places, any mains, pipes, tanks, conduits, or wires with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation, be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, co-partnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax."

"§42. Assessment of Special Franchises: The State Board of Tax Commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town, or tax district. After the time fixed for hearing complaints, the Tax Commissioners shall finally determine the valuation of the special franchises, and shall file with the Clerk of the city or town in which said special franchise is assessed, a written statement, duly certified by the Secretary of the Board of the valuation of each special franchise assessed therein, as finally fixed and determined by said Board; such statement of valuation shall be filed with the Town Clerk of the respective towns within thirty

days next preceding the first day of July in each year; and with the Clerks of cities of the State within thirty days before the date set opposite the name of each city in the following schedule. In the City of New York such statement shall be filed with the Department of Taxes and Assessments. * * *

Each City or Town Clerk shall, within five days after the receipt by him of the statement or assessment of a special franchise by the State Board, deliver a copy of such statement certified by him to the assessors or other officers charged with the duty of making local assessments in each tax district in said city or town, and to the assessors of villages and commissioners of highways within their respective towns and villages. The valuations of every special franchise as so fixed by the State Board, shall be entered by the assessors or other officers in the proper column of the assessment roll before the final revision and certification of such roll by them, and become part thereof with the same force and effect as if such assessment had been originally made by such assessor or other officer."

"§46. DEDUCTION FROM SPECIAL FRANCHISE TAX FOR LOCAL PURPOSES: If, when the tax assessed on any special franchise is due and payable, under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, co-partnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, co-partnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village, except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes. * * * ."

The Relator, The Brooklyn City Railroad Company, was incorporated in December, 1853, by filing articles of association under the General Railroaw Law, then in force (L. 1850, Ch. 140), for the corporate purposes of constructing, operating and maintaining street surface railroads in the City of Brooklyn (pp. 33-4). Section 28, Sub. 5, of that act then required "the assent of the corporation of the City," as a condition precedent to the construction of railroads in the streets of a city.

In the year 1853, and prior to the incorporation of the Relator, the City of Brooklyn had advertised that it would grant permission to construct street surface railroads in various specified streets of the City to such persons as would, by competitive bidding, agree to construct and operate for the lowest rates of fare, on certain prescribed conditions (pp. 287-8). Divers persons were lowest bidders for railroads in divers streets, respectively (pp. 288-90). These bidders afterwards, and in the same year, procured the incorporation of the Relator, The Brooklyn City Railroad Company, as aforesaid, and requested that the assent of the corporation of the City of Brooklyn should be given to said company to construct, maintain and operate such railroads on the terms of such lowest bids (p. 290).

Thereupon resolutions were duly adopted by the Common Council of said City, and approved by the Mayor, December 22, 1853 (pp. 287-92), providing that The Brooklyn City Railroad Company had the assent of the corporation of the City of Brooklyn to the constructing, maintaining and operating by the said company of street surface railroads upon the streets specified, and upon the terms and conditions therein expressed, on condition that the said company should enter into good and sufficient bonds conditioned on faithful performance of all the conditions and stipulations in said resolutions contained, "and that the said roads shall be perfectly completed and conducted." On December 30, 1853, The Brooklyn City Railroad Company accordingly executed and delivered to the City of Brooklyn its bond in the penal sum of Two hundred

thousand dollars ($200,000), which bond is still in force (p. 292).

Among other terms and conditions of the said resolutions of the Common Council of the City of Brooklyn which The Brooklyn City Railroad Company as aforesaid agreed to observe, keep and perform, it was provided that the company should construct and operate the railroad in the manner specified; should keep the pavement in thorough repair within its tracks and three feet on each side thereof, under the direction of such competent authority as the Common Council should designate; that the operation of its cars should be subject to such prudential regulations as the Common Council should from time to time adopt; that the cars should be of the most approved kind in style and finish; that such a number of cars should be run on each route as public convenience should require and be subject to such prudential regulations as the Common Council should from time to time adopt; and the further provisions, which The Brooklyn City Railroad Company, by its bond as aforesaid, agreed to observe and perform, as follows:

> "The rates of fare for each passenger and the license fee for each car to be paid annually into the city treasury shall be on the respective lines above-mentioned:
>
> 1. Furman Street route, fare not to exceed five cents, license fee $50. 2. Court Street route, fare not to exceed four cents, license fee, $20. 3. Powers Street route, fare not to exceed five cents, license fee, $20. 4. Flatbush Avenue route, fare not to exceed five cents, license fee, $20. 5. Fulton Avenue route, fare not to exceed four cents, license fee, $20. 6. Myrtle Avenue route, fare not to exceed four cents, license fee, $20. 7. Sands Street route, fare not to exceed five cents, license fee, $10. 8. Front Street route, fare not to exceed five cents, license fee, $10."

The said resolutions of the Common Council of the City of Brooklyn were ratified and confirmed by Chapter 77 of the Laws of 1854, entitled "An Act in Relation to

the Brooklyn City Railroad Company," passed March 23, 1854, which provided, among other things, as follows:

> "§2. The said company are hereby authorized to construct and operate their said railroad over the several routes mentioned in their articles of association, and to continue the same from the termination thereof, respectively, as designated in their said articles of association, filed in the office of the Secretary of State, on the seventeenth day of December last, and subject to the provisions of the act entitled, "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, into or through any town in the County of Kings, over, across or upon any road or highway therein, whenever the said company shall receive the consent, in writing, of the supervisor and commissioners of highways, or a majority of them. * * *
>
> §3. The said company are hereby authorized to charge the rates of fare stipulated for the said routes respectively, within the City of Brooklyn, in the conditions of the assent of the City of Brooklyn, adopted by the Common Council thereof, on the seventeenth day of December, last, and approved by the Mayor thereof, on the twenty-second day of December last, and such other rates within said city as may hereafter be agreed upon between the said company and the said City of Brooklyn."

The said resolutions of the Common Council were uniformly held by the Courts of the State of New York to have been originally authorized by the said Act of 1850, Chapter 140, §28, Sub. 5, and also to have been subsequently ratified and confirmed by the said Act of 1854, Chapter 77.

Thus in *Brooklyn Central R. R. Co. v. Brooklyn City R. Co.*, 32 Barb., 358, the Supreme Court, at General Term (1860) per BROWN, J., said, at pp 362-4:

> "The 2d Section of the Act of the 23d March, 1854, in relation to the Brooklyn City Railroad Company, was designed to conform, as far as it needed confirmation, the title of the company to the franchise claimed, for it declares, in express words, that, 'the

said company are hereby authorized to construct and operate their said railroad over the several routes mentioned in their articles of association.' This grant is to construct and operate, and therefore comprehend as well the finished as the unfinished routes referred to in the charter. It is a grant of the franchise, with all the incidents, from the sovereign power of the State, and so far as I can see, has not been repealed or modified in any degree. * * *

There is another undisputed fact in the case which must not be omitted in this connection; and that is, that the City Railroad Company, in execution of the power to which I have referred, proceeded, at its own expense, and with a view to its own exclusive use, to construct and lay down the railway in Furman Street which is the subject of this litigation. In the case of *The State of New York v. The Mayor, etc., of the City of New York* (3 Duer., 119), the Superior Court held that a resolution of the Common Council granting to Jacob Sharpe and others the right, on certain conditions, to construct a railroad in Broadway, and to run cars upon it, was not an act of legislation, nor a law, in the proper sense of the term, but the grant of a franchise, and when accepted by the grantee, became a contract upon the terms and conditions set forth in the resolution and ordinance. And, inasmuch as the Common Council had no power to release the control over one of the principal streets of the city, its resolution and the grant claimed under it was declared to be invalid and void. The resolution of the Common Council of the City of Brooklyn, of the 19th December, 1853, by which it signified its assent to the construction of the railroad over the routes designated in the articles of association of the City Railroad Company upon the conditions annexed thereto, was authorized by the 5th Subdivision of the 28th Section of the general railroad act, and therefore lawful, and the acceptance thereof with the conditions annexed by the City Company, constituted a contract which the company was bound to perform, and which the Common Council could not rescind without adequate cause. Rights acquired under a statute of a State, which is in its nature a contract, and which does not reserve to the Legislature the power of repeal, cannot be divested by subsequent legislation."

Under such contract, thus originally authorized and thus subsequently ratified by the State Legislature, the pioneer street surface railroad in the City of Brooklyn was constructed by this Relator, the Brooklyn City Railroad Company. Such contract was, to a large extent treated as the standard for subsequent contracts of like nature between the City and this and other railroad companies.

Various other railroad corporations were subsequently formed and consolidated into and with the Brooklyn City Railroad Company, so that, on and prior to the second Monday of January, 1900, the date as of which the assessment in question is deemed to have been made, the Brooklyn City Railroad Company held forty-five similar contracts with the municipalities for the construction, maintenance and operation of its street surface railroads on divers streets in the present boroughs of Brooklyn and Queens in the City of New York, which contracts had been previously held by thirteen different companies. Most of these contracts contained substantially the same provisions as the original contract between the City and this company (Exhibits 1C-68C, pp. 281-302).

Several of the contracts contain provisions similar to those in the contract of June 19, 1893 (Exhibit 18C, p. 286), that the company should pay to the city a certain percentage of its gross receipts annually, and that the company should, at all times, keep accurate books of account, subject to the inspection of the local authorities of the city.

The original contract of December, 1853, between the City of Brooklyn and this Company was subsequently modified in various respects by resolutions of the Common Council, accepted and agreed to by the company—one set of such modifications relating mostly to changes in the rates of fare chargeable by the company (Exhibits 22C-25C, pages 293-4), in pursuance of the authority granted by Laws 1854, Ch. 77, §3 (Exhibit 21C, p. 287), providing that this company might charge such other rates of fare within the City as might thereafter be agreed upon between the said company and the City of Brooklyn.

The situation is the same, for the purposes of this appeal, as if all of the stipulations and conditions contained in all of these forty-five different contracts had been contained in a single contract between the city and this company.

These forty-five different contracts between the city and this company, represent substantially all the features common to all contracts of like nature in New York City, with one exceptional feature common to all street surface railroad companies in Brooklyn.

The exceptional feature peculiar to all the street surface railroad companies in the former City and present Borough of Brooklyn, was an important modification, duly assented to by the companies, of all previous contracts between the city and such companies, made in pursuance of Laws 1880, Ch. 564, adding a new Sub. 11 to §13 of Title 2 of the Charter of the City, authorizing the Board of Aldermen to fix an annual license fee, not exceeding the sum of twenty dollars ($20), for each street or horse car operated in the City of Brooklyn, and providing (p. 225):

> "The said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not release said company from any obligations required by law to keep such streets or avenues, or any part thereof, in repair, which said obligations and the contracts, laws or ordinances creating and enforcing the same are hereby continued in full force and operation."

In pursuance of this legislation, further contracts were made between the City and such companies by ordinance, duly adopted December 27, 1880, by the Common Council and accepted by the companies and still in force, changing the agreement to pay license fees as contained in the original contract of this company, and adding an agreement to pay license fees where the other forty-four contracts did not already contain such an agreement. Thereafter this company has annually paid such license fees at the rate of twenty dollars ($20) per car for the average number

of cars operated in the former City and present Borough of Brooklyn, amounting to about $13,000 per year; and on payment thereof by this company each year, the city has executed and delivered to the Relator an instrument in writing, signed by the Mayor and attested by the Clerk, under the corporate seal of said city, declaring that, in pursuance of an ordinance of the Common Council, the city thereby licensed and appointed this company to run cars on its routes in the streets of said city *under the provisions of the contract of said company with said city.*

The entire proceeding connected with this new contract for the payment of license fees in full satisfaction for the use of the streets shows that the license fees were, in fact, taxes, imposed for the sake of adding to the revenues of the city, and not license fees proper (Exhibit 3*h*, pages 324-33).

The legislation authorizing such ordinance was re-enacted in the various revisions of the charters of the City of Brooklyn and Greater New York (all set out in full, Exhibit 3*h*, at pp. 224-31), and, together with the ordinance, is still in force.

Another important feature, common to this and to many other companies, is the clause of its original contract of December, 1853, with the city, that this company should give its bond to the city that its "said roads shall be perfectly completed and conducted," which bond, in the penal sum of $200,000, was duly given and is still in force (p. 292).

I.

The State cannot impose additional burdens of the same nature as those already imposed by the franchise contracts duly made and entered into by and between the City of Brooklyn, as the duly delegated representative of the people of the State, party of the first part thereto, and The Brooklyn City Railroad Company, party of the second part thereto.

Chicago v. Sheldon, 9 Wall., 50; 19 L. Ed., 594.

In the case above cited, the City of Chicago, being thereunto duly authorized by the State Legislature, enacted an ordinance authorizing the North Chicago City Railway Company to construct and operate its railroads on the streets of that City, on terms and conditions therein specified, prescribing, among other matters, the amount of paving which should be done by the railroad company, and that the railroad company should give a bond to the City for the faithful performance of the terms and conditions of the ordinance, which the company did.

The Court in that case, said:

> "Since this contract was made between the City and the railway company, and carried into complete execution by the latter at a heavy expense, the Common Council passed an ordinance for the improvement of some of the streets occupied by the company * * * ; and a special tax or assessment of $28,676.94 has been imposed for this purpose upon the property of the railway company and the collection threatened * * *.
>
> The bill was filed by Sheldon against the city to enjoin the authorities from collecting a special tax or assessment levied upon the North Chicago City

Railway Company for improvements of the streets upon which their rails were laid, of which company the complainant was a stockholder." * * *

"It is claimed on the part of the railway company, that by the true construction of their contract, they are exempt from the assessment made upon their property, and the 7th Section of the Ordinance of the 23rd May, 1859, is referred to and relied on in support of this construction. That section prescribes the obligations and duties of the company in respect to the condition and repairs of the streets during the whole period of the running of the contract, and imposes certain burdens upon it as to repairs, from which, to their extent, the City, or adjoining owners of lots, are relieved. It is insisted that this provision was intended, and so understood by both parties, as regulating the whole subject as it respects improvements of the streets occupied by the Company, and to fix in the contract the extent of their liability.

"The language of it is somewhat peculiar, and it cannot well be denied but that a fair and reasonable interpretation favors this view. It is as follows: 'The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets or parts of streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition.' Now, it is quite clear that the above recitals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the company, namely, they should keep in good condition and repair eight or sixteen feet, as they use a single or double track, along the entire length of the road. They were not to grade, pave, macadamize, fill or plank even the above width or distance, except so far as such work came within the category of repairs." * * *

"A contract having been entered into between the parties, valid at the time, by the laws of the State, it

> is not competent even for its Legislature to pass an Act impairing its obligation, much less could any decision of its Courts have that effect."

The decree of the U. S. Circuit Court restraining the city from collecting the pavement tax in question was affirmed.

In *Coast Line Ry. Co vs. Mayor of Savannah,* 30 Fed., 646, the United States Circuit Court said:

> "The City of Savannah and the railroad company, by virtue of their respective charters, had the power to contract and they did contract. They contracted in these words:
>
> "'In the event of the paving by the City of the whole or any portion of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good and thorough repair by the company at its own expense and cost.'
>
> "This was the limit of the paving to be done by the company. '*Expressio unius exclusio alterius.*' This maxim is never more applicable than when applied to the interpretation of a statute.

The reasoning of the case first above cited (*Chicago v. Sheldon*, 9 Wall, 50), has been followed, and the doctrine of that case has been uniformly adopted, by both Federal and State Courts, as the law of the land, so that two propositions are well established and well settled, as follows:

1. A duly authorized municipal ordinance or resolution assenting to the construction, maintenance and operation by a street railroad corporation of its railroads on the streets of a municipality, when accepted by the railroad corporation, becomes a contract which neither the State nor the municipality can afterward modify without the consent of the railroad corporation.

2. The terms of such contract regulate the whole subject of matters "properly involved in and being a part of the contract," and as to such matters, all additional provisions made by State legislation or municipal ordinance to the detriment of the railroad company, and without its

consent, are void as impairing the obligation of the contract.

The second above proposition is well stated by this Court, in City of Detroit v. Detroit Citizens Street Ry. Co., 184 U. S., 368, as follows:

> "The contract once having been made, the power of the City over the subject so far as altering the rates of fare *or other matters properly involved in and being a part of the conract* is suspended for the period of the running of the contract."

The following are but a few of the many cases which might be cited in support of both the above propositions:

City of Cleveland v. Cleveland City Ry. Co., 194 U. S., 517; 48 L. Ed., 1102, affg., s. c., 94 Fed., 385.

City of Cleveland v. Cleveland Electric Ry. Co., 194 U. S., 598; 48 L. Ed., 1109., affg. s. c., 94 Fed., 385.

City of Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368; 46 L. Ed., 592.

Los Angeles v. Los Angeles Water Co., 177 U. S., 558; 44 L. Ed., 886.

City of Walla Walla v. Walla Walla Water Co., 172 U. S., 1; 43 L. Ed., 341.

Coastwise Ry. Co. vs. Mayor of Savannah, 30 Fed., 646.

City of Rochester v. Rochester Ry. Co., 98 App. Div., 521, at pp. 536-39, and cases there cited.

City of Worcester v. Worcester Consol. St. Ry. Co. (decided Feb. 20, 1905); L. Ed., Advance Sheets, April 1, 1905, p. 27.

II.

The franchise contracts, in question, fixed, and therefore necessarily limited, the amount of burdens in the nature of taxes which the Brooklyn City Railroad Company could thereafter be compelled to pay, on account of its property consisting of the intangible rights created by such franchise contracts.

The very statute in question, which authorizes the assessment of "special franchises," itself distinctly recognizes the license fees and percentages of gross receipts which the Brooklyn City Railroad Company is required by its franchise contracts to pay, as being in the nature of a tax. Section 46 of the statute provides that if the corporation assessed for a special franchise has paid,

> "under any agreement therefor, or any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise * * * which payment was in the nature of a tax, all amounts so paid * * * except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners."

Even without such statutory recognition of the true character of such "license fees" and percentages of gross receipts, it is perfectly clear that by whatsoever name they may be called, both are, in fact and in law, taxes. The Courts have often had occasion to distinguish between a license fee, properly so-called, and a tax. The distinction is too familiar to require a citation of cases for its elucidation.

The Courts of New York have passed on the precise question, in the case of the particular class of so-called

"license fees" required to be paid by the original franchise contract of the Brooklyn City Railroad Company, and by the subsequent modifications thereof as afterwards agreed upon between the City and the Railroad Company.

Mayor of N. Y. vs. Second Ave. R. R. Co. (1865), 32 N. Y., 261; affg. s. c., 34 Barb., 41.
Mayor, etc., N. Y. vs. Third Ave. R. R. Co. (1865), 33 N. Y., 42.

Each of these cases was brought by the City of New York against the defendant Railroad Company to recover a penalty of $50 for violation of an ordinance of the Common Council of said city adopted December, 1858, providing that:

> "Every passenger railroad car running in the City of New York below One hundred and twenty-fifth Street, shall pay into the City Treasury the sum of $50 annually for a license."

and prescribing a penalty of $50 for running a car without the payment of such annual license fee. Each defendant railroad corporation set up in its answer its franchise contract entered into with the City prior to the ordinance of 1858, whereby it was authorized, on terms and conditions therein expressed, to construct, maintain and operate its street surface railroads in said city. The plaintiff demurred to the answer as not constituting a defense.

The franchise contract of the Second Ave. R. R. Co., set up in its answer, consisted of a series of resolutions of the Common Council of said city, adopted in November, 1852, and taking effect December 11th, 1852, very similar to the original franchise contract of the Brooklyn City Railroad Company. The city consented that certain persons therein named, should have the right to lay and operate street railroad tracks upon certain streets specified, providing as to the character of the rails, the mode of construction, the motive power to be used, the frequency of operation, the rates of fare, and requiring the Railroad

Company to enter into a bond for the performance of the terms and conditions of the said resolutions, which bond was duly entered into.

The franchise contract of the Third Ave. R. R. Co. consisted of similar resolutions of the Common Council of said city, taking effect December 31, 1852, requiring a similar bond, which was duly entered into on January 1, 1853.

The only distinction between the two franchise contracts, material to this discussion, was that the franchise contract of the Second Ave. R. R. Co. was wholly silent as to license fees, whereas the franchise contract of the Third Ave. R. R. Co. required payment of "the annual license fee for each car now allowed by law."

Such of the facts of these two cases above stated as do not appear in the official reports, are obtained from the printed cases on appeal.

In the Second Avenue case (32 N. Y., 261), the Court of Appeals, speaking of the annual license fee of $50 per car sought to be imposed on the Railroad Company, said:

> "It is in vain, therefore, to speak of it, or to treat it, as a license, or a regulation of police. It is the imposition of an annual tax upon the company, in derogation of its rights of property and on that ground is unlawful and void."

In the same case, at General Term, CLERKE, P. J., in one of the prevailing opinions, referring to the same annual license fee of $50 per car sought to be imposed on the Railroad Company, said:

> "This is only a taxing power in the guise of establishing ordinances for good rule and government."

In both these two cases the Supreme Court and the Court of Appeals assumed and asserted that the annual license fee of $50 per car, sought to be imposed on the Railroad Company, was not a license fee, properly so-called, but was a tax; and one of the grounds on which the Presiding Judge at General Term held the proposed

ordinance void was that the Common Council had no authority under the City Charter to impose a tax.

The Court of Appeals, in Mayor v. Broadway and Seventh Avenue Railroad Company, 97 N. Y., 275, at pp. 282-3, citing the two, Second and Third Avenue cases (32 N. Y., 261; 33 N. Y., 42), said of the Second Avenue case:

> "It was held * * * that the ordinance was the imposition of an annual tax upon the company in derogation of its rights of property and on that ground was unlawful and void."

In that case (Mayor, etc., vs. Broadway and Seventh Avenue R. R. Co., 97 N. Y., 275), the action was brought by the City to recover license fees at the rate of $50 per car and the defense was urged by the railroad company that inasmuch as the license fees were really a tax, and as an action would not lie to recover a tax, therefore the action to recover such license fees could not be maintained; but the answer was obvious that as the defendant company had agreed in and by its franchise contract to pay the license fees, the action to recover them, whether they were considered license fees, tax or penalty, could be maintained as upon contract, and that they were not a tax or penalty within the doctrine that an action would not lie for their recovery; nor, as to the Broadway and Seventh Avenue R. R. Co., a tax or penalty which was without the sanction of law. It was with reference to this specific controversy that the following language was used by MILLER, J., in that case (97 N. Y., at pp. 282-3):

> "The contract of the defendant arises from the provisions of its charter by which it agrees to pay a certain sum reserved therein in consideration of the privileges conferred thereby. It is neither a tax nor is it a penalty *and hence the technical rules as to the penal actions or suits to recover a tax which are invoked by the appellant have no application.*"
>
> "The ordinance was, therefore, valid as to the City railroads which were required by their charters or by contract with the city to pay a given sum to the city

> in consideration of the privileges conferred. In case of a grant by legislative power the right to collect the amount fixed as a license confers express authority to enforce the payment of the same, and in no sense can it be considered as the imposition of a tax or a penalty which is without the sanction of the law."

There was no intention by the language above quoted, to deny the general proposition, already acknowledged, that the license fee was a tax, but the intention of the Court was merely to assert that the license fee in question which the company had agreed in and by its franchise contract to pay, was not subject to the technical rules as to penalty actions, or as to actions for the recovery of a tax.

But wholly apart from the reasoning and authority of the cases cited, it is clearly established by what are now familiar and well settled principles of elementary law, that the so-called license fees which the Brooklyn City Railroad Company agreed to pay in and by its franchise contract of 1853, as well as the increased license fees which the City and the company afterward, in pursuance of the amendment of 1880, agreed should be paid in lieu thereof, were not license fees properly so-called, but were taxes; and that both the original and subsequent agreements to pay such license fees were agreements to pay taxes. It is also clear that the provisions of other franchise contracts of the Brooklyn City Railroad Company requiring payment of percentages of gross receipts were in like manner agreements to pay taxes.

There ought, therefore, to be no controversy, here, over the clear proposition that in and by its franchise contract of 1853, the Brooklyn City Railroad Company expressly agreed to pay certain taxes annually. This is as clear as if the word tax had been used in the resolutions of the Common Council instead of the term license fee. Such contract has since continued in force, and during the year for which the assessment here in question was made, the Brooklyn City Railroad Company paid as taxes under the name of license fees, about $13,000 (p. 60, fol. 84).

Assuming, therefore, as we have a right to, that The

Brooklyn City Railroad Company in and by its franchise contract agreed to pay certain taxes annually on account of its intangible right, created by such franchise contract, the next question arising in logical order for determination is, whether the same reasoning is to be applied to the agreement to pay taxes, which has been uniformly applied by all Courts to corresponding agreements for paving, for rates of fare, and other like terms and conditions.

In taking up the discussion of this question, it should be borne in mind that the original franchise contract here in question, although originally made by the municipality in pursuance of due authority from the State, was afterward in all its terms ratified and confirmed by the State, so that it is in effect a direct contract with the State itself; and it is primarily a contract for the performance of a public service to the people of the State. As one of the stipulations of the original contract the party of the second part absolutely agrees to "perfectly complete and conduct the railroad," whether the operation be profitable or not, with a bond in the penal sum of $200,000, conditioned upon the performance of such stipulation. Every dollar invested in the enterprise must be lost and the bond forfeited, if the venture shall prove unprofitable at the rates of fare specified, which cannot be increased by the party of the second part.

The original franchise contract of 1853 was entered into on the wise basis of the lowest fares consistent with efficient service and reasonable profit, such lowest fares to be ascertained by competitive bidding. Additional burdens on the companies in the nature of taxation would necessarily mean that the bidders should specify higher rates of fare in their bids. Therefore, the City wisely provided for moderate taxes in the form of license fees, in the original contract, instead of higher taxes and correspondingly higher fares to be paid by the great mass of the people who must travel on the street cars between their homes and their work.

Every business contract made by the State or the City with a private person or corporation for the construction

of a public work, or with even the janitor of a public building for his weekly service and weekly pay, is property of the contracting person or corporation or janitor; but, as a matter of common sense law, can it be contended for a moment that the State or City, having made such a contract requiring continuous performance, and granting the continued right to perform accordingly, and while the contract is still executory and being performed, can assess the value of such contract, on the basis of the estimated profits of the party of the second part thereunder or otherwise, and impose a tax on the basis of such assessment, and thereafter collect the tax, either by deducting the amount of the tax from the amount agreed to be paid to the contractor or janitor, or by making the tax a lien on the contract and taking away the contract by foreclosure of the lien?

The reasoning at the foundation of this question was well stated in the Second Avenue case, already cited (32 N. Y., 261, affg. s. c., 34 Barb., 41), at General Term, by SUTHERLAND, J., in one of the prevailing opinions, as follows:

> "I look upon the question raised by the demurrer in this case as a question of property, of vested rights, resting on or secured by grant or contract.
>
> "The resolutions and agreement set up in the defendants' answer were in effect the grant of a valuable franchise or property. The agreement was not only in effect but in form a contract; and the franchise, which is the subject of it, is as much within the protection of the constitution as any other property or right resting on, or derived from, contract. * * *
>
> "The franchise granted is, of course, held by the defendants, and is to be enjoyed by them, upon the terms and conditions specified in the grant or contract; and I think the question in the case really is, whether, from the grant, contract or agreement itself, it can fairly be inferred that the plaintiffs intended to reserve the right, thereafter at any time, and from time to time, to impose the payment of these license fees without limitation as to amount, and thus impair, if not utterly destroy, the franchise granted." * * *

The franchise contract in that case was silent as to payment of license fees or taxes. The presiding Judge, at the same General Term, in the same case, was equally clear and emphatic. Referring to the franchise contract, CLERKE, P. J., in the other prevailing opinion, said (34 Barb., at p. 45):

> "The license given by the agreement was unqualified, and, therefore, the ordinance incorporated into that agreement by which the defendants are bound to abide by all other regulations or ordinances which may be thereafter passed by the Common Council could not have included a regulation or ordinance requiring any additional license. * * * It reserved the right, in short, to regulate the mode of running, not to nullify the privilege of running altogether. For this would be the effect of allowing the Common Council to impose a license fee upon the company; it would be allowing the plaintiffs to say we now order you no longer to run your cars, unless you pay us a heavy fine or penalty, although we have already promised that you should run without requiring the payment of any sum. If they have the right to impose the payment of $50 they have the right to impose any greater sum, which may be so oppressive as to make it no longer worth while to continue running the cars; and thus in effect rescinding the agreement without any violation of it on the part of the defendants."

The Court of Appeals, in the same case, affirming the decision of the General Term, said, per BROWN, J. (32 N. Y., at p. 272):

> "The resolutions which were incorporated into the contract were not an act of legislation, which the Common Council could modify or repeal, without the consent of the other party to the instrument." * * *
>
> "The only act enjoined by the ordinance in question is the payment of the $50, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. If the Legislature should by law require every head of a family throughout the State to pay to the collector the sum of $20, and take his receipt therefor, it would be a fiscal measure, an expedient to replenish the treasury, not a regulation of police, prescribing a rule of action and

conduct. So with this ordinance, call what it requires by the name of license or certificate of payment, or anything else, its primary, and indeed, only purpose is, to take from the company, under coercion of the penalty which it imposes, the sum of $50 annually, for each car run upon the road, and for the benefit of the city.

"The certificate which the company is to receive, upon the payment being made, is called a license, in the ordinance. A license to do what? The ordinance does not say—and, indeed, it could not, with truth, say—a license or permission to employ the car in the transportation of passengers upon the road—for the absolute right to do that which had been not only acquired, but positively enjoined upon the company, by the stipulations of the grant of the 15th of December, 1852. It is in vain, therefore, to speak of it, or to treat it as a license, or a regulation of police. *It is the imposition of an annual tax upon the company, in derogation of its rights of property, and, on that account, is unlawful and void.*"

In the Third Avenue case (*City of New York v. Third Avenue R. R. Co.*, 33 N. Y., 42) the ordinance sought to be enforced required the payment of an additional license fee larger than the amount agreed to be paid by the Railroad Company in and by its franchise contract, and the following is substantially the entire opinion of the Court:

"Our decision at the March term, in the case of the *City of New York vs. Second Avenue Railroad Company*, substantially disposes of this question (32 N. Y., 261). The increase of the sum payable as a license fee, under the ordinance of 1858, beyond the amount provided for by the stipulations in the contract of 1853, so far as it was in derogation of the defendant's rights, must be deemed illegal and void. It was not the exercise of the power of municipal regulation, reserved by the terms of the grant, and which the common council had no authority to alienate, but it was simply an attempt by one of the parties to a contract to revoke a provision inserted for the benefit of the other. The common council could not lawfully impose a penalty for non-compliance with an illegal exaction."

These two—*Second Ave. R. R. Co.* and *Third Ave. R. R. Co.*—cases (32 N. Y., 261, and 33 N. Y., 42) have been frequently cited, always with approval, in this and other jurisdictions, and were expressly followed in

Stein vs. Mayor of Mobile, 49 Ala., 362, and
City of Los Angeles vs. Los Angeles Water Co., 61 Cal., 65,

which last case, in turn, was cited approvingly on this point in

Los Angeles vs. Los Angeles City Water Co., 177 U. S., 588; 44 L. Ed., 886.

The two *Second* and *Third Avenue R. R. Co.* cases (32 N. Y., 261, and 33 N. Y., 42) have been thus elaborately presented, in this brief, not so much because of the compulsory force of their authority, as because of their fundamentally sound and convincing reasoning.

The same line of reasoning was the basis of the decision made by this Court in *Gordon v. Appeal Tax Court* (1845), 3 How. (U. S.), 133; 11 L. Ed., 529.

Neither the authority nor the reasoning of these three cases has been weakened by any of the subsequent cases expressly citing them, nor by any of the subsequent cases discussing similar questions involving the consideration of similar lines of reasoning.

Even if this Court should deem that there is no compelling or overpowering authority in favor of the proposition, or leading to the result, for which counsel for plaintiff in error is now contending, it is certain that there is no compelling or overpowering authority to the contrary. An elaborate analysis of all the cases which may appropriately be examined in this connection, will still leave this Court free to adopt the proposition, and to reach the result, here contended for by counsel for plaintiff in error, if this Court shall approve the reasoning which controlled the decisions of the *Second* and *Third Avenue R. R. Co.* cases (32 N. Y., 261, and 33 N. Y., 42), and of the *Gordon* case (3 How., 133).

In view of the other briefs filed in the other cases of like nature with this, and argued contemporaneously with this case before this Court, it is deemed sufficient, for the purposes of this brief, to merely cite the following cases which, perhaps, ought to be examined for the purposes of a comprehensive review of all the authorities which have considered this precise line of reasoning:

Mayor v. Broadway and Seventh Ave. R. R. Co., 97 N. Y., 275.

Mayor v. 23rd St. R. R. Co., 113 N. Y., 311.

People ex rel. Cayadutta Plank Road Co. v. Cummings, 166 N. Y., 110.

Delaware Railroad Tax Case, 18 Wall, 206; 21 L. Ed., 888.

New Orleans, etc., R. R. Co. v. New Orleans, 143 U. S., 192; 36 L. Ed., 121; affg. s. c., 40 La. An., 587; 4 So. Rep., 512.

Detroit v. Citizens St. Ry. Co., 184 U. S., 368.

Returning to the discussion of the precise question now under consideration, as though it were an original question before this Court, it will be noticed that the reasoning of the *Second Avenue R. R. Co. case* (32 N. Y., 261) goes much further than it is necessary to go in this case to sustain the proposition, and to reach the result, contended for by counsel for plaintiff in error.

In the *Second Avenue R. R. Co.* case (32 N. Y., 261), the franchise contract was silent as to payment of license fees or other charges in the nature of taxes. Nevertheless, the Court held that the contract covered the entire subject matter of taxation of the right created by the contract, and that the imposition of a tax on such right, under the guise of a license fee, was "in derogation of the company's rights of property and on that account was unlawful and void."

In the *Third Avenue R. R. Co.* case (33 N. Y., 42), the franchise contract provided that the Company should pay a certain tax, under the name of a license fee, on the right created by the contract, and the Court held that the im-

position of an additional tax on such right, under the name of a license fee, would be an impairment of the obligation of the contract.

It will undoubtedly be conceded that if the franchise contract of the Brooklyn City Railroad Company had expressly provided that the Company should pay a tax on account of its rights created by such contract, in lieu of all other taxes on account of such rights, that then the imposition of any additional tax on such right would be an impairment of the obligation of the contract.

The final proposition of counsel for plaintiff in error is, that the language of the original franchise contract of the Brooklyn City Railroad Company is equivalent to express language that the Company should pay a specific tax on account of its rights created by the contract, in lieu of all other taxes on account of such rights.

This final proposition involves purely the construction, by the Court, of the provisions of a contract, for the purpose of ascertaining, from the language used and from the surrounding circumstances, the intention of the parties entering into the contract.

The construction of statutes and of contracts, howsoever strict or howsoever liberal, in every case alike, has the one supreme purpose in view, of ascertaining the intent of the parties to the transaction. A strict construction is adopted, in certain cases, merely because, under certain of the surrounding circumstances, the parties framing or assenting to the language used are presumed to have desired and intended to produce or to avoid certain results, and because the language used and the other surrounding circumstances do not satisfactorily rebut such presumption

Conceding the most strenuous statement, permissible, of the doctrine of strict construction of a contract between the State and a private person in relation to the amount of tax payable by the private person on certain specific property, nevertheless it is not necessary that such contract should contain express words of negation, to prevent the imposition of additional taxes beyond those specifically

agreed to be paid. A contract between the State and a private person, by which the latter agrees to pay a specific tax upon specific property, is as comprehensive and conclusive as to the amount of tax afterward chargeable on that property, during the term of the contract, as if the contract were for specific rental of property leased or specific payment of the purchase price of property sold. Certainly the amount of tax agreed to be paid, on account of the right to operate a railroad, is no more sacred than the amount of fares which the Railroad Company may charge the traveling public, and is of the same general nature as the amount of street paving which it is agreed the Railroad Company shall perform. This Court has distinctly and uniformly held that an agreement in a franchise contract that a railroad company may charge certain rates of fare, prohibits the State from thereafter requiring reduced rates of fare during the term of the contract; and that an agreement in a franchise contract, that a railroad company shall perform a certain amount of street paving, precludes the State from thereafter requiring additional paving during the term of the contract, although in neither case was there any express language that the rates of fare should not thereafter be reduced, nor that the amount of paving should not thereafter be increased. The Court, guided by the one supreme purpose of ascertaining the intent of the parties, will give the same construction to a contract whereby a certain tax is agreed to be paid on certain property.

The circumstances surrounding the making of the franchise contract of 1853, between the City of Brooklyn and the Brooklyn City Railroad Company, are especially significant in this connection. It is manifest that the one controlling aim of the city was to procure the lowest rates of fare, and that the amount of taxes on account of the rights created by the contract, was a secondary consideration on the part of the city. Accordingly, the bidders for the right were required to make competitive bids, on the two amounts, the rate of fare and the "annual fee payable to

the City" (pp. 288-9). Competitive bids were submitted for seven routes.

For each of the first three routes the lowest bid was "at four cents per passenger and an annual fee to the city of $20 for each car."

For the fourth route the lowest bid was "at five cents per passenger and an annual fee to the city of $10 for each car."

For the fifth route the lowest bid was "at five cents per passenger and a fee to the city of $50 per annum for each car."

For the sixth route the lowest bid was "at five cents per passenger and an annual fee to the city of $20 per car."

For the seventh route the lowest bid was "at five cents per passenger and an annual fee to the city of $10 per car."

(Pages 288-9.)

It is manifest that the City intended that the bidders should be induced to bid low rates of fare if their bid for the annual fee to the city should be reduced accordingly; or higher rates of fare if the annual fee to the city should be increased accordingly. In other words, it was intended that the amount of tax should be reduced, if thereby a reduced rate of fare could be obtained, and that bidders should be induced to bid low rates of fare by the assurance of correspondingly low taxes on the right to be acquired.

The franchises were granted in accordance with the terms of the lowest bids as aforesaid (p. 291). The State, by special statute (L. 1854, Ch. 77), ratified and confirmed the franchise contract in this and all other respects.

For over forty-five years the practical construction of this franchise contract by the State, the City, and the Railroad Company, was, that the franchise contract covered the entire subject matter of taxes payable on account of the right created by the contract. The State did not, during such forty-five years, attempt to modify the provisions of the franchise contract without the consent of the Railroad Company until the enactment of the statute here in question, L. 1899, Ch. 712.

III.

The failure of the Special Franchise Tax Law to indicate any principle or method for ascertaining the value of the intangible property included in the special franchise; the failure of the State Board to attempt any separate valuation of the intangible property; and its failure to adopt or proceed upon any principle or method of valuing the totality of intangible and tangible property together constituting the special franchise; and necessarily the substitution therefor, of speculation and guesswork, in place of judgment, in making such valuation, amounted to such an absence of quasi-judicial action as to constitute the taking of property without due process of law; and so far as the statute contemplates such a procedure, the statute itself is unconstitutional, for the same reason.

In fixing and determining the valuation of the special franchises of the respondents, no rule, method or principle was followed by the State Board, nor was the Board able to devise any such rule, method or principle.

The value of the tangible property included in the special franchises of each of the respondent corporations was clearly proven and practically conceded.

The evidence and the findings of fact show clearly that the increase in the amount of the assessment on account of the existence of the intangible property was fixed by the State Board by processes amounting to nothing more than guesswork. This was inevitable in view of the inherently impracticable character of the statute itself.

The absence of any principle of valuation prescribed in the statute itself and the impossibility, from the nature of the object taxed, of supplying such a principle for the guidance of the assessors, together with the admitted failure, on the part of the respondents, to find, devise or use any rule, method or principle of valuation, necessarily make the assessments unjust, inequitable and in violation of the Fourteenth Amendment of the Federal Constitution, which prohibits the taking of property without due process of law.

This proposition is amply sustained by the decisions bearing upon tax laws and the essentials of their validity.

In *People vs. San Francisco Savings Union*, 31 Cal., 132 (decided in 1866), the plaintiff, a taxpayer, assailed the validity of a tax upon the ground that the assessor had not made a valuation of the property. The Court, per SAWYER, J., at page 138, said (italics ours):

> "Section Thirteen, Article XI, of the Constitution, requires all property to be taxed in proportion to its value, to be ascertained as directed by law, and provides that assessors shall be elected. *A valuation is the very foundation of proceedings for apportioning and collecting a tax upon property. It is essential to the validity of a property tax.* It was so held in *People vs. Hastings*, 29 Cal., 449, and that the valuation must be made by the assessors. *If the assessor has failed to make an intelligible valuation, that duty cannot be performed or the defects remedied by the Auditor.* Nor can the Legislature make the valuation. Clearly, then, under the authority cited, there is no valuation shown by the original assessment roll or the duplicate, for the same defect exists in both. They, therefore, afford no evidence of a tax legally denied."

In this situation, two alternatives present themselves. Either *(a)* the property is to be assessed arbitrarily and capriciously and according to what is admitted by the assessors to be an assessment not based upon any uniform or general principle whatsoever; or else *(b)* the Court will have to declare the statute itself invalid because of the fatal absence of any principle or method of valuation in accord-

ance with which the property sought to be taxed can be assessed.

As to these two alternatives, it does not admit of dispute that, as a matter of justic and equity, the latter is by far preferable. Rather than permit a statute to remain in force which permits the arbitrary and, almost inevitably, the capricious taking away of property under the guise of taxation, it is surely better that an existing inequitable statute should be removed from the statute books, and, as is entirely practicable, that a new tax enactment, one susceptible of an equitable enforcement on a general and uniform principle of valuation, be enacted in its stead.

IV.

The multiple assessments of the property of this Relator by different methods, amounts to depriving this Relator of the equal protection of the laws.

In this connection, the attention of the Court is called to the manifold methods of taxing the property of this Relator as shown by the evidence at pp. 57-62.

V.

The judgment of the Supreme Court, entered on the filing of the remittitur from the Court of Appeals, should be reversed, with costs.

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Washington, April 10, 1905.